

(3)  
No. 89-1279

Supreme Court, U.S.

FILED

JUN 1 1990

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

*Petitioner,*

v.

CLEOPATRA HASLIP, ET AL.,

*Respondents.*

On Writ of Certiorari  
to the Supreme Court of Alabama

BRIEF OF AMICI CURIAE LIABILITY INSURANCE  
UNDERWRITERS IN SUPPORT OF PETITIONER

Donald V. Jernberg  
**OPPENHEIMER WOLFF**  
**& DONNELLY**  
Two Illinois Center  
233 N. Michigan Avenue  
Chicago, Illinois 60601  
Telephone: (312) 819-4670

Thomas P. Kane  
(*Counsel of Record*)  
Ross F. Plaetzer  
**OPPENHEIMER WOLFF**  
**& DONNELLY**  
1700 First Bank Building  
St. Paul, Minnesota 55101  
Telephone: (612) 223-2500

Counsel for Amici Curiae

June 1, 1990

**BEST AVAILABLE COPY**

## **QUESTIONS PRESENTED**

Amici will address the following questions, the first of which corresponds to Question 2, and the second to Question 1, in the petition for a writ of certiorari:

1. Does imposition of a punitive damage award violate the Fourteenth Amendment's due process requirement where the award is based on a vicarious or relational theory of liability and where the award is not rationally related to a legitimate punitive or deterrent function?
2. Does imposition of a punitive damage award violate the Fourteenth Amendment's due process requirement where the award is imposed absent a showing of a minimum degree of control or a minimal consciousness of the act for which punishment is to be imposed and where the award is not rationally related to a legitimate punitive or deterrent function?

## TABLE OF CONTENTS

<b>TABLE OF AUTHORITIES</b> .....	iii
<b>INTEREST OF AMICI CURIAE</b> .....	1
<b>SUMMARY OF ARGUMENT</b> .....	3
<b>ARGUMENT</b> .....	3
I. <b>PUNITIVE DAMAGE AWARDS         IMPLICATE THE DUE PROCESS         CLAUSE OF THE FOURTEENTH         AMENDMENT</b> .....	3
II. <b>THE PUNITIVE DAMAGES         AWARDED AGAINST PETITIONER         UNDER A VICARIOUS OR         RELATIONAL THEORY OF         LIABILITY VIOLATE DUE         PROCESS BECAUSE THEY ARE         NOT RATIONALLY RELATED TO         THE GOALS OF PUNISHMENT OR         DETERRENCE</b> .....	4
III. <b>THE DUE PROCESS CLAUSE         REQUIRES EVIDENCE OF A         THRESHOLD MISCONDUCT         BEFORE PUNITIVE DAMAGES         MAY BE IMPOSED ON A         DEFENDANT</b> .....	7
(a) <b>Aims Of Punitive Damages</b> .....	8
(b) <b>Punishment Goal</b> .....	9
(c) <b>Deterrence Goal</b> .....	10
(d) <b>Threshold Mental-State             Requirement</b> .....	12

CONCLUSION .....	15
APPENDIX .....	16

## TABLE OF AUTHORITIES

### CASES:

<i>Baltimore &amp; Ohio R. Co. v. Goodman,</i> 275 U.S. 66 (1927) .....	11
<i>Bearden v. Georgia</i> , 461 U.S. 660 (1983) .....	4
<i>Bielski v. Schulze</i> , 16 Wis. 2d 1, 114 N.W.2d 105 (1962) .....	13
<i>Browning-Ferris Industries of Vermont, Inc.</i> <i>v. Kelco Disposal, Inc.</i> , 492 U.S. ____ (1989) .....	5, 7
<i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981) .....	5
<i>Davidson v. Cannon</i> , 474 U.S. 344 (1986) .....	4
<i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64 (1938) .....	5
<i>Haslip v. Pacific Mutual Life Ins. Co.</i> (R.T. 897-98) .....	5
<i>Lake Shore &amp; Michigan Southern R. Co. v.</i> <i>Prentice</i> , 147 U.S. 101 (1893) .....	5, 6
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982) .....	4
<i>Milwaukee &amp; St. Paul R. Co. v. Arms</i> , 91 U.S. 489 (1876) .....	13
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977) .....	6
<i>Morissette v. United States</i> , 342 U.S. 246 (1952) .....	9

<i>Poe v. Ullman</i> , 367 U.S. 497 (1961) .....	4
<i>Powell v. Texas</i> , 392 U.S. 514 (1968) .....	10
<i>Ruckelshaus v. Monsanto Co.</i> , 467 U.S. 986 (1984) .....	4
<i>Schall v. Martin</i> , 467 U.S. 253 (1984) .....	4
<i>Smith v. Wade</i> , 461 U.S. 30 (1983) .....	8, 9, 12
<i>Tinker v. Colwell</i> , 139 U.S. 473 (1902) .....	12
<i>Western Union Telegraph Co. v. Eyser</i> , 91 U.S. 495 (1876) .....	13, 14
<i>Wise v. Daniel</i> , 221 Mich. 229, 190 N.W. 746 (1922) .....	10
<i>Youngberg v. Romeo</i> , 457 U.S. 307 (1982) .....	4
<b>STATUTES:</b>	
11 U.S.C. §523(a)(6) (1988) .....	12
Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 .....	12
<b>MISCELLANEOUS:</b>	
Calabresi and Klevorick, Four Tests For Liability In Torts, 14 J. Legal Studies 585 (1985) .....	11
Morris, Enterprise Liability and the Actuarial Process -- The Insignificance of Foresight, 70 Yale L.J. 554 (1961) .....	4
W.P. Keeton, Prosser and Keeton on Law of Torts § 34 at 214 (5th ed. 1984) .....	13

No. 89-1279

---

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

*Petitioner*,

v.

CLEOPATRA HASLIP, ET AL.,

*Respondents*.

On Writ of Certiorari  
to the Supreme Court of Alabama

---

BRIEF OF AMICI CURIAE LIABILITY INSURANCE  
UNDERWRITERS IN SUPPORT OF PETITIONER

---

INTEREST OF AMICI CURIAE<sup>1</sup>

Amici curiae are insurance companies that write  
various lines of casualty and liability insurance, including

---

1. The consents of Petitioner and Respondents for the filing of  
this brief are on file with the Clerk of the Court.

comprehensive general liability ("CGL") insurance.<sup>2</sup> In 1989, amici wrote several billion dollars of CGL coverage in the United States. Their insureds range from small entrepreneurial, start-up manufacturers of innovative technology to long-established multinational corporations. What unites amici is their common and vital interest in the maintenance of a healthy insurance and risk-financing system in this country.

In the past, it has been possible for underwriters to assess the overall risks encountered by their insureds and, concomitantly, establish policy premiums and deductibles, with some degree of accuracy. Now all this has changed. Predictability, long the cornerstone of the American common-law system, and essential to effective risk management, is rapidly evaporating amid what has been characterized as the "Insurance Availability/Affordability Crisis."<sup>3</sup> One of the many causes contributing to this crisis was the increase in the number and amount of punitive damage awards. Many States, of course, preclude an insured's receiving indemnification for punitive awards on public policy grounds. A few States, on the other hand, do not allow an insurer to exclude coverage for punitive damages. The growing threat of these awards has now become a major source of uncertainty in lawsuits involving underlying claims that are within the scope of existing policies. Not only does the presence of punitive damage claims increase the costs of defense under such policies, but

punitive damages also make settlements more difficult or impossible.

There are two principal obstacles. One is the potential liability of an employer for a punitive damage award made against the employer's employee or agent in situations where the employer has no possible means of detecting or preventing the employee or agent's misconduct and in no way ratifies, encourages, or blindly neglects the misconduct. A second obstacle is the lack of a clear standard in many states that delineates the types of misconduct that may make a person subject to punitive damages. The arguments in this brief demonstrate why punitive damages should not be allowed under the Due Process Clause of the Fourteenth Amendment against an employer based *solely* on a *respondeat superior* theory and also why there must be evidence of a delineated threshold of misconduct before a jury may impose a punitive award.

## SUMMARY OF ARGUMENT

Punitive damages serve only two narrow legitimate purposes -- punishment and deterrence. Yet, where punitive damages are assessed under a vicarious or relational theory of liability or where punitive damages are imposed absent a showing of a minimum degree of control or a minimal consciousness of the act for which punishment is to be imposed, the assessment serves neither a punitive nor deterrent function. Accordingly, the assessment of punitive damages in such a case is an irrational exercise of state power and violates the substantive component of the Fourteenth Amendment's due process guarantee.

---

2. Amici curiae are, in alphabetical order: Great American Insurance Companies; Hawkeye-Security Insurance Company; Interstate Fire & Casualty Company; Mutual Service Casualty Insurance Company; and United Security Insurance Companies.
3. *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability.* The Report is dated February, 1986 and was made public in March, 1986.

## ARGUMENT

### I. Punitive Damage Awards Implicate The Due Process Clause Of The Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any

person of . . . property, without due process of law." Petitioner invokes the substantive component of the clause. The substantive component of the Fourteenth Amendment's due process guarantee is intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986). Amici and petitioner have a property interest that is protected by the Fourteenth Amendment and that is violated by both the threat and the actual imposition of punitive damages in civil actions where the only basis of liability is a vicarious one or where the alleged misconduct is not willful or conscious. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31 (1982); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

Substantive due process always has required, at a minimum, that a court scrutinize State action to insure that it has a rational basis and a legitimate objective. In determining whether a substantive right protected by the Due Process Clause has been violated, "it is necessary to balance 'the . . . [property interest] of the individual' and 'the demands of an organized society.'" *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). In seeking this balance, the Court has "weighed the individual's interest in [property] against the State's asserted reasons for . . . [depriving the individual of property]." *Youngberg v. Romeo*, 457 U.S. at 320. Ultimately, the inquiry is whether the State action was fundamentally fair, or, instead, was arbitrary and irrational. *Schall v. Martin*, 467 U.S. 253, 263 (1984); *Bearden v. Georgia*, 461 U.S. 660, 674 (1983).

## II. The Punitive Damages Awarded Against Petitioner Under A Vicarious or Relational Theory Of Liability Violate Due Process Because They Are Not Rationally Related To The Goals Of Punishment Or Deterrence.

In awarding an injured party compensatory damages, the law allocates losses and spreads risks to those most able to prevent an occurrence or to bear the loss. *See Morris, Enterprise Liability and the Actuarial Process -- The*

*Insignificance of Foresight*, 70 Yale L.J. 554 (1961). In stark contrast, this Court has noted that punitive damages serve only two narrow legitimate purposes. First, they punish the defendant. *See, e.g., Haslip v. Pacific Mutual Life Ins. Co.* (R.T. 897-98) (jury instructed in this case that it could award punitive damages "to punish the defendant"); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 235, 253 (1989) (O'Connor, J., concurring in part and dissenting in part). Second, punitive damages serve to deter certain wrongful conduct. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) (a major objective of punitive damages is deterrence).

Yet, where punitive damages are assessed under a vicarious or relational theory of liability, the award serves neither the punitive nor deterrent purpose and, therefore, may not be imposed consistent with due process requirements. This case presents an excellent example of the irrationality of a such a punitive award. The record below is clear that petitioner did not authorize, ratify or encourage Mr. Ruffin's acts in any manner nor did it profit from those acts. In addition, Mr. Ruffin was not authorized to act on behalf of petitioner in any managerial capacity. There was neither a jury instruction nor a determination by the State courts that petitioner *itself* had any culpability. The State courts, on the contrary, held that the imposition of punitive damages was permissible on the basis of *respondeat superior* alone.

Given these facts, the punitive award against petitioner can serve no rational purpose. Specifically, the award does not punish the wrongdoer because the record is clear that only Mr. Ruffin, and not petitioner, engaged in any misconduct. In *Lake Shore & Michigan Southern R. Co. v. Prentice*, 147 U.S. 101 (1893), this Court drew a distinction, as a matter of "general jurisprudence,"<sup>4</sup> between the direct liability of a corporation for policies, practices, or conduct

---

4. *Lake Shore & Michigan Southern R. Co.* is a diversity case that was decided before *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

of its officers and directors, and the conduct of its employees for which it might be found vicariously liable. See 147 U.S. at 117. By this distinction, the Court held that punitive damages may be assessed against the corporation based on the acts of the former but may not be assessed because of the acts of the latter, absent some showing that the corporation participated in, approved or ratified the wrongful conduct. See 147 U.S. at 117.

Although decided as a matter of general jurisprudence, the reasoning underlying *Lake Shore & Michigan Southern R. Co.* is clear and applies equally to a due process analysis. That is, one should not be punished for the misconduct of another when one engages in no culpable act and is in no better position than is the public at large to take precautions against certain misconduct. Indeed, punishment (as opposed to compensatory loss allocation) by reason of mere association is contrary to "the basic values that underlie our society." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). Accordingly, due process must prevent a State from awarding punitive damages that are based solely on a party's relation to a wrongdoer.

Amici liability insurers are uniquely situated in this respect and are concerned that this Court uphold the principle that punitive awards may not be based solely on a party's relation to a wrongdoer. First, like other insurers, amici employ field "agents" to solicit applications for coverage and to forward on such applications. This practical and long-standing method of operation allows amici to serve efficiently a large segment of the population and to provide liability insurance at affordable premiums. It is practically impossible, however, for amici to detect or prevent the sort of flagrant misconduct in which Mr. Ruffin, the agent, engaged in this case.

Second, and more importantly here, as *liability* insurers amici enter into contracts indemnifying named insureds for liability that those named insureds may become obligated to pay to others. In entering into such contracts and in setting corresponding premium rates, amici attempt to assess the risk presented by the named insured. Such risk

becomes extremely difficult to assess, however, where punitive damages may be assessed against a named insured based solely on that insured's *relation to another person or entity* rather than as a result of the named insured's *own acts or omissions*. Moreover, even the threat of punitive damages' being assessed against a named insured based solely on the insured's relationship to a nearly limitless and fluid pool of potential wrongdoers is sufficient to have a substantial negative impact on the business interests of amici and on the national risk-financing system in general. Accordingly, amici respectfully request this Court to hold that the Due Process Clause prohibits an award of punitive damages against a party where the award is based solely on that party's relation to a wrongdoer.

### **III. The Due Process Clause Requires Evidence Of A Threshold Misconduct Before Punitive Damages May Be Imposed On A Defendant.**

Fundamental fairness demands that there be evidence of a minimum threshold of misconduct before punitive damages constitutionally may be imposed. In deciding what types of misconduct are eligible for consideration for an award of punitive damages, fact-finders must be "guided by . . . more than an admonition to do what they think is best." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. at \_\_\_ (Brennan, J., concurring).

In many of the 45 States<sup>5</sup> that allow punitive awards in civil cases, the fact-finder (usually a jury) is given unbridled discretion -- a standardless power -- to determine whether to impose punitive damages. While State requirements for determining whether a defendant should be

---

5. See Appendix for a list of the standards the States have adopted for imposing punitive damages.

assessed punitive damages are not uniform, they often require only that the jury find some vague type of misconduct. See, e.g., Arizona and Kansas (in Appendix). Cf. *Smith v. Wade*, 461 U.S. 30, 48 (1983). Beyond this, there is nothing to safeguard against the arbitrary and capricious imposition of punitive damages against a defendant. Moreover, there is no safeguard against a jury's consideration of extraneous emotional factors in making that award. The law in many States, including that in Alabama at the time of the punitive damage award in this case,<sup>6</sup> lacks any standard to guide the jury in determining whether the alleged misconduct merits an award of punitive damages. There is nothing to focus the jury's attention on the precise circumstances of the defendant's alleged misconduct and to insure that a particularized consideration of the relevant aspects of each defendant's conduct is made before a punitive damage award is imposed.

The Due Process Clause requires, at minimum, that a State establish a range of discretion within which the fact-finder operates when deciding whether to impose punitive damages against a particular defendant.

#### **(a) Aims Of Punitive Damages**

If punitive damages are to serve their punitive and deterrent purposes, the focus, necessarily, must be on "the character of the tortfeasor's *conduct* -- whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Smith v. Wade*, 461 U.S. at 54 (emphasis added). Due process demands that a State's purported purposes of punishing a defendant for misconduct and deterring like conduct in the future be balanced against the defendant's ability actually to avoid such future wrongful conduct. If the defendant, or others similarly situated, cannot take steps to avoid similar conduct in the

future, it is arbitrary and irrational to impose punishment with the goal to alter future behavior.

Conduct involving some sort of wrongful motive, actual intention to inflict harm or the conscious doing of an act known to be unlawful involves a degree of consciousness, a state of mind, and, therefore, the element of choice. Where the element of choice exists, one can choose whether to undertake such conduct or whether to refrain from it. Cf. *Morissette v. United States*, 342 U.S. 246, 250 (1952) (This principle "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.") Accordingly, punishing such wrongful conduct is fair and seeking to deter like future conduct by an award of punitive damages is rational. In contrast, however, if the conduct that the State seeks to punish or that the State seeks to deter is void of any conscious or mental element, thereby eliminating the aspect of choice, the punishment and deterrent purposes are futile.<sup>7</sup>

#### **(b) Punishment Goal**

Rational, non-arbitrary punishment can be imposed against only misconduct that demonstrates a mental state or that the actor is able to control or prevent. A simple example will show that an actor's mental state has a great influence on our legal (and moral) evaluation of his act. We are not angry -- except perhaps for a moment before we come to our senses -- with a person who trips us by accident. But we are angry with the person who *tries*, albeit unsuccessfully, to trip us up. Yet the first has hurt us and the second has not. The difference is that the second

---

6. Alabama amended its law of punitive damages, effective June 11, 1987, but that change did not apply to the award of punitive damages made in this case. See 1987 Alabama Acts, No. 87-185.

7. Some States, for instance, permit punitive damage awards merely upon a showing of very careless or negligent conduct by the defendant -- "gross negligence" or "recklessness." See Appendix (e.g., Florida, New Mexico, North Carolina and Texas). These types of conduct differ fundamentally from the conduct described above because they involve the *absence* of a mental element.

*intended harm*, while the first did not. We have the belief that a person *ought not to try* to do us harm. If it happens by accident, we assign no moral culpability to the act. In contrast, if the act is intentional, it is morally blameworthy, even if it is ultimately unsuccessful.<sup>8</sup>

Likewise, punishing an act or condition, or some behavior, that a person or entity is unable to control or to take feasible precautions against is repugnant and irrational. Although "this Court has never articulated a general constitutional doctrine of *mens rea*," *Powell v. Texas*, 392 U.S. 514, 535 (1968), required before punishment may be imposed against particular conduct, it is clear that conduct that the actor cannot control or prevent cannot be punished.

There is no rational connection between the punishment imposed and the alleged "misconduct" where there has been no choice or conscious failure to choose by the actor or where the conduct cannot be controlled or prevented. Accordingly, due process prohibits imposition of punitive damages absent a finding of some intent to perform the act or omission causing the injury.

### (c) Deterrence Goal

Deterrence is a rational aim against only misconduct that can be repeated. The deterrent value of a sanction depends, in part, on the precision used in defining the

---

8. "If a cow kicks a man in the face, the consequent physical hurt may equal that from a kick in the face with a hob-nailed boot, but the 'cussedness' of the cow raises no sense of outrage, while the malicious motive back of the boot kick adds materially to the victim's sense of outrage."

*Smith v. Wade*, 461 U.S. at 65 n.5 (Rehnquist, J., dissenting) (quoting *Wise v. Daniel*, 221 Mich. 229, 233, 190 N.W. 746, 747 (1922)).

contexts in which it may be invoked. It is true that some courts have attempted rigidly and specifically to define, for instance, what constitutes negligence, or recklessness, under a given, likely repeatable factual circumstance. *See Baltimore & Ohio R. Co. v. Goodman*, 275 U.S. 66 (1927) (Holmes, J.) (motorist required to stop, look and listen at level-grade railway crossing). But, by and large, courts view their task as defining whether a given actor's conduct on a particular occasion has fallen below the objective standard of care. Often there is no intimation of whether *as a matter of law* such behavior inevitably will be considered negligent, or even reckless, in similar future instances. The less specific the definition of conduct is, the less effective it can be as a guide to be used by individuals in shaping their future course of conduct.

A fundamental point that must be considered in evaluating whether deterrence can, in fact, be a State's legitimate, rational aim against conduct not involving choice or control is that deterrence, in such situations, is always a function of the controllability and recurrence of a given risk-creating or harm-causing situation. Where harm results from a causal chain not readily capable of exact or even similar repetition, a finding that an actor's particular conduct in a given factual situation was wrongful cannot serve as a future incentive to that actor or to others to conform their future behavior to a correct standard of action.

Deterrence is a possible objective only where it can be assumed that the "data learned *ex post* give *useful guidance for altering future behavior*." *See Calabresi and Klevorick, Four Tests For Liability In Torts*, 14 J. Legal Studies 585, 596 (1985) (emphasis added). But where "our probability beliefs about the future are unchanged by the accident's occurrence . . ., [what was] a sensible risk-benefit assessment before the accident remains a sensible one now." *Id.* at 599. Such assessments can, however, be made only in factual settings that are controllable by the actor and are capable of similar or identical recurrence.

Recurrence of a particular activity in an identical or similar fashion is possible, however, (except only by

coincidence) only where the elements of choice or control are part of the conduct. In such instances, deterrence is possible, and therefore rational, because the penalty imposed can alter the actor's choice of conduct.

#### (d) Threshold Mental-State Requirement

Therefore, punishment and deterrence can be effective, and are rational, only where the "character of the tortfeasor's conduct," *Smith v. Wade*, 461 U.S. at 54, contains a requisite (and sufficiently precisely defined) mental state or where the actor effectively can control or prevent the conduct. That the requirement of a certain degree of control or a certain mental state is part of our ordered sense of justice and fairness is evident from the numerous statutory enactments passed within the last few years in various States in different regions of the country regarding punitive damages. Cf. Appendix (e.g., Iowa and Minnesota).

A standard that requires only that conduct be "outrageous," "callous," "indifferent to the rights of others," "grossly negligent" or "reckless," without also requiring a mental element of intent, willfulness, consciousness or deliberateness, allows punitive damages to be awarded without a rational purpose.<sup>9</sup>

---

9. The requirement that there be a certain threshold mental state before conduct may be considered truly reprehensible and warranting punishment is not new. Section 523 of the Bankruptcy Reform Act of 1978, Pub.L. 95-598, 92 Stat. 2549, exempts from discharge an individual debtor's debt when that debt is "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. §523(a)(6). "'Willful' means deliberate or intentional." House Rep. No. 95-595 at 365, 95th Cong., 1st Sess. (1977) (accompanying 1978 Act). Congress specifically overruled the "reckless disregard" standard that this Court had imposed in *Tinker v. Colwell*, 139 U.S. 473 (1902), on a predecessor section in the Bankruptcy Act of 1898.

A standard of misconduct demanding inquiry into the mental state of the defendant has been adhered to previously by the Court, although not in a constitutional context. In *Milwaukee & St. Paul R. Co. v. Arms*, 91 U.S. 489 (1876), a diversity case, the verdict was reversed because the jury was charged erroneously that it might award punitive damages on a finding of "gross negligence." The Court held that it was error to give an instruction that "gross negligence" would support a finding of punitive damages.<sup>10</sup> The Court stated:

To [impose punitive damages], there must have been some *willful* misconduct, or that entire want of care which would raise the presumption of a *conscious* indifference to consequences.

91 U.S. at 495 (emphasis added).

The meaning of the *Arms* decision was underscored by *Western Union Telegraph Co. v. Eyster*, 91 U.S. 495 (1876), decided the same day. In *Western Union*, Justice Davis, who also authored *Arms*, wrote for a unanimous Court in holding that to merit an award of punitive damages, wrongful

---

10. "Gross negligence" is "an anomaly and contradiction in terms," and "[m]uch of what constitute[s] gross negligence . . . constitute[s] a high percentage of ordinary negligence." *Bielski v. Schulze*, 16 Wis.2d 1, 18, 114 N.W.2d 105, 112-13 (1962). Likewise, there "is often no clear distinction at all between ['recklessness'] and 'gross' negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence." W.P. Keeton, *Prosser and Keeton on Law of Torts* §34 at 214 (5th ed. 1984).

conduct must be characterized by "willfulness" or "intent." *Id.*<sup>11</sup>

Although decided on the basis of "federal common law," the holdings in *Amns* and *Western Union* underscore the validity of a similar requirement in the context of the Due Process Clause. Whether misconduct is characterized by "willfulness," "intent," "consciousness," "deliberateness," "maliciousness," "vindictiveness," "fraud," or "wantonness" is immaterial. Each requires a certain mental state on the part of the actor and each connotes the element of choice and, concomitantly, control or prevention. Where the elements of choice or control exist, there is a rational connection between the State's goals of punishment and deterrence and the actor's misconduct. There is fundamental fairness because the defendant-actor could have acted differently but chose not to do so. A mere showing of very careless or negligent conduct by the defendant -- "gross negligence," "recklessness,"

or "extreme carelessness" -- does not satisfy the required threshold standard of conduct for punitive damages because the requisite mental element is completely lacking.

Petitioner's conduct does not meet the constitutional threshold for an award of punitive damages. Because there was no evidence that petitioner engaged in deliberate or conscious misconduct towards respondents, the award of punitive damages against it is unconstitutional.

## CONCLUSION

For the reasons stated above, the judgment of the Alabama Supreme Court should be reversed and the case remanded for a new trial on only compensatory damages.

Respectfully submitted,

Donald V. Jernberg  
**OPPENHEIMER WOLFF**  
**& DONNELLY**  
Two Illinois Center  
233 N. Michigan Avenue  
Chicago, Illinois 60601  
Telephone: (312) 819-4670

Thomas P. Kane  
(*Counsel of Record*)  
Ross F. Plaetzer  
**OPPENHEIMER WOLFF**  
**& DONNELLY**  
1700 First Bank Building  
St. Paul, Minnesota 55101  
Telephone: (612) 223-2500

Counsel for Amici Curiae

June 1, 1990

11. The Reporter of Decisions only summarized the *Western Union* case. The opinion is, however, reported in full at 23 L.Ed. 377. It reads as follows:

The decision just rendered in . . . *Amns* . . . controls this case. In no view of the evidence was the court justified in instructing the jury that exemplary damages could be recovered. The omission to station flag sentinels or to give some other proper warning, while the men were engaged in putting up the [telegraph] wire, was an act of negligence, entitling the plaintiff to compensatory damages. But there was nothing to authorize the jury to consider this omission as *willful*. On the contrary, the evidence rebuts every presumption that there was any *intentional* wrong.

23 L.Ed. 377 (emphasis added).

## APPENDIX

Alabama:	(conscious or deliberate oppression, fraud, wantonness or malice; including reckless disregard for rights and safety of others) Ala. Code § 6-11-20	Delaware:	(evil motive or conscious indifference to rights of others) <u>Jardel Co. v. Hughes</u> , 523 A.2d 518 (Del.1987)
Alaska:	(outrageous conduct; including reckless indifference to rights of others and conscious action in deliberate disregard of their rights) <u>Sturm, Ruger &amp; Co. v. Day</u> , 594 P.2d 38 (Alaska 1978), <i>overruled on other grounds</i> , <u>Dura Corp. v. Harned</u> , 703 P.2d 396 (Alaska 1985)	District of Columbia:	(fraud, ill will, recklessness, wantonness, willful disregard of plaintiff's rights or other circumstances tending to aggravate the injury) <u>Franklin Investment Co. v. Homburg</u> , 252 A.2d 95 (D.C.1969)
Arizona:	(outrageous conduct done with bad motive or with reckless indifference to interest of others) <u>Smith v. Chapman</u> , 115 Ariz. 211, 564 P.2d 900 (1977)	Florida:	(gross and flagrant negligence evidencing reckless disregard for human life) <u>White Const. Co. v. Dupont</u> , 455 So. 2d 1026 (Fla. 1984)
Arkansas:	(wantonness or conduct with such conscious indifference to consequences that malice might be inferred) <u>Freeman v. Anderson</u> , 279 Ark. 282, 651 S.W.2d 250 (1983)	Georgia:	(willful misconduct, malice, fraud, wantonness, oppression, or entire want of care that would raise presumption of conscious indifference to consequences) Ga. Code § 51-12-5.1
California:	(oppression, fraud or malice; including willful and conscious disregard for rights and safety of others) Cal. Civil Code § 3294	Hawaii:	(wanton or oppressive conduct as implies a spirit of mischief or criminal indifference to civil obligations; or misconduct that raises presumption of conscious indifference to consequences) <u>Masaki v. General Motors Corp.</u> , 780 P.2d 566 (Haw. 1989)
Colorado:	(circumstances of fraud, malice or willful and wanton conduct) Colo. Rev. Stat. § 13-21-102	Idaho:	(oppressive, fraudulent, wanton, malicious or outrageous conduct) Idaho Code § 6-1604
Connecticut:	<i>In products liability actions</i> : (reckless disregard for safety of product users, consumers and others) Conn. Gen. Stat. § 52-240b  <i>In tort actions generally</i> : (reckless indifference to rights of others or intentional and wanton violation of those rights) <u>Garland v. Heyman</u> , 203 Conn. 616, 525 A.2d 1343 (1987)	Illinois:	(malicious or wanton conduct) <u>Kimes v. Trapp</u> , 52 Ill. 2d 442, 202 N.E.2d 42 (1964)
		Indiana:	(willful and wanton misconduct) <u>Orkin Exterminating Co. v. Traina</u> , 486 N.E.2d 1019 (Ind. 1986)
		Iowa:	(willful and wanton disregard for the rights or safety of others) Iowa Code § 668A.1

Kansas:	(wanton and reckless disregard for plaintiff's rights) <u>W-V. Enterprises v. Federal S &amp; L</u> , 234 Kan. 354, 673 P.2d 1112 (1983)	Nebraska:	(punitive damages not recoverable), 200 Neb. 1, 261 N.W.2d 766 (1978)
Kentucky:	(oppression, fraud or malice) Ky. Rev. Stat. § 411.184	Nevada:	(oppression, fraud or malice, express or implied) Nev. Rev. Stat. § 42.005
Louisiana:	(punitive damages not generally allowed) <u>Richard v. State</u> , 390 So.2d 882 (La. 1980)	New Hampshire:	(punitive damages not awarded unless authorized by statute) N.H. Rev. Stat. Ann. § 507.16
Maine:	(malice, including deliberate conduct so outrageous as to imply malice) <u>Tuttle v. Raymond</u> , 494 A.2d 1353 (Me. 1985)	New Jersey:	(actual malice or wanton disregard of others' safety) N.J. Stat. Ann. § 2A:58C-5
Maryland:	(malice, actual or implied) <u>Miller Building Supply, Inc. v. Rosen</u> , 305 Md. 341, 503 A.2d 1344 (1986)	New Mexico:	(gross negligence, malice or other circumstances of aggravation) <u>Gray v. Esslinger</u> , 46 N.M. 421, 130 P.2d 24 (1942)
Massachusetts:	(punitive damages not normally recoverable) <u>Caperei v. Huntoon</u> , 397 F.2d 799 (1st Cir. 1968) (dictum)	New York:	(evil or wrongful motive or reckless indifference equivalent thereof) <u>Le Mistral, Inc. v. Columbia Broadcasting System</u> , 61 A.D.2d 491, 402 N.Y.S. 2d 815 (1978)
Michigan:	(malicious or so willful and wanton as to demonstrate reckless disregard for rights of others) <u>Bailey v. Graves</u> , 411 Mich. 510, 309 N.W.2d 166 (1981)	North Carolina:	(gross or wanton negligence) <u>Paris v. Michael Kreitz, Jr. P.A.</u> , 75 N.C. App. 365, 331 S.E.2d 234
Minnesota:	(deliberate disregard for rights and safety of others) Minn. Stat. § 549.20, subd. 1(a)	North Dakota:	(oppression, fraud or malice, actual or presumed) N.D. Cent. Code § 32-03.2-11
Mississippi:	(gross negligence that indicates reckless or wanton disregard for safety of others) <u>Mississippi Power Co. v. Jones</u> , 369 So.2d 1381 (Miss. 1979)	Ohio:	(flagrant disregard for safety of persons who might be harmed) Ohio Rev. Code Ann. § 2307.80
Missouri:	(wanton, willful or outrageous act or reckless disregard for act's consequences) <u>Burnett v. Griffith</u> 769 S.W.2d 780 (Mo. banc 1989)	Oklahoma:	(wanton or reckless disregard for rights of another, oppression, fraud or malice) Okla. Stat. Ann. tit. 23 § 9
Montana:	(actual fraud or malice) Mont. Code Ann. § 27-1-221	Oregon:	(wanton disregard for health, safety and welfare of others) Or. Rev. Stat. § 30.925

Pennsylvania: (evil motive or reckless indifference to rights of others) Feld v. Merriam, 506 Pa. 383, 485 A.2d 742 (1984)

Rhode Island: (willfulness, recklessness or wickedness) Sherman v. McDermott, 114 R.I. 107, 329 A.2d 195 (1974)

South Carolina: (Willful, wanton or in reckless disregard of plaintiff's rights) Cohen v. Allendale Coca-Cola Bottling Co., 291 S.C. 35, 351 S.E.2d 897 (App. 1985)

South Dakota: (willful, wanton or malicious conduct) S.D. Comp. Laws Ann. § 21-1-4.1

Tennessee: (fraud, malice, oppression, conscious indifference to consequences or gross negligence) Island Container Corp. v. March, 529 W.2d 43 (Tenn. 1975)

Texas: (fraud, malice or gross negligence) Tex. Stat. Ann. art. § 41.003

Utah: (willful, intentionally fraudulent or knowing and reckless indifference to rights of others) Utah Stat. § 78-18-1

Vermont: (actual malice, including reckless disregard of rights) Shortle v. Central Vermont Pub. Serv. Corp., 137 Vt. 32, 399 A.2d 517 (1979)

Virginia: (malice, or such recklessness or negligence as evinces a conscious disregard of rights of others) Booth v. Robertson, 236 Va. 269, 374 S.E.2d 1 (1988)

Washington: (punitive damages not allowed absent specific statutory authorization) Kammerer v. Western Gear Corp., 96 Wash. 2d 416, 635 P.2d 708 (1981)

West Virginia: (gross fraud, malice, oppression or wanton, willful or reckless conduct, or criminal indifference to civil obligations affecting rights of others) Wells v. Smith, 297 S.E.2d 872 (W.V. 1982)

Wisconsin: (malicious, willful or wanton conduct in reckless disregard of rights or interests of others) Wangen v. Ford Motor Co., 97 Wis.2d 260, 294 N.W.2d 437 (1980)

Wyoming: (wanton and willful misconduct) Weaver v. Mitchell 715 P.2d 1361 (Wyo. 1986)